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IN THE SUPREME COURT OF THE UNITED STATES

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No. 618

A. F. REEDER,
Appellant,

VERSUS

W. F. BANKS: ERNEST MORRIS, COUNTY TREASURER OF WASHITA COUNTY, OKLAHOMA,
Appellees.

Appeal from the Supreme Court of the State of Oklahoma

BRIEF OF APPELLANT IN RESPONSE TO MOTION TO DISMISS OR AFFIRM

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FEBRUARY, 1948.

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Appendix

IN THE SUPREME COURT OF THE UNITED STATES

No.

A. F. REEDER,
Appellant,

VERSUS

W. F. BANKS: ERNEST MORRIS, COUNTY TREASURER OF WASHITA COUNTY, OKLAHOMA,[1]
Appellees.

Appeal from the Supreme Court of the State of Oklahoma

BRIEF OF APPELLANT IN RESPONSE TO MOTION TO DISMISS OR AFFIRM

This brief is filed in response to appellee, W. F. Banks' motion to dismiss, filed and served on appellant, February 6, 1948 and supplemental motion to dismiss, filed and served on appellant, February 13, 1948.

This case is an appeal from a judgment of the Supreme Court of the State of Oklahoma in *Baccus* v. *Banks*, No.

[1]Successor to Vernon Baccus, former County Treasurer of Washita County, Oklahoma, substituted by order of Court of January 28, 1948.

32,427, not yet officially reported in the Oklahoma Reports, but reported in Oklahoma Bar Journal, November 1, 1947, Volume 18, No. 38, Page 1577.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

1. This is an appeal from a final judgment rendered in the Supreme Court of the State of Oklahoma, on the 28th day of October, 1947, same being the highest court of the State of Oklahoma in which a decision could be had, in which was drawn in question the validity of a statute of Oklahoma, on the ground of its being repugnant to the Constitution of the United States, and the decision was in favor of its validity.

2. Petition for rehearing was filed in the Supreme Court of the State of Oklahoma, on November 10, 1947, same being within fifteen (15) days of said judgment, as provided by Rule 28 of the Supreme Court of the State of Oklahoma; said petition for rehearing was denied on January 6, 1948, and this appeal was docketed in the Supreme Court of the United States within the time provided by law.

3. The statute involved in the Supreme Court of the State of Oklahoma is Senate Bill 164, 1939 Session Laws of Oklahoma, Page 156, said statute being relied on solely by the Supreme Court of the State of Oklahoma as grounds for its judgment, and specifically held to be constitutional.

There was drawn in question in the trial court and in the State Supreme Court the validity of said 1939 Act on

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the ground of its being repugnant to the United States Constitution.

4. The provisions of the United States Constitution invoked by appellant in the trial court and in the Supreme Court of the State of Oklahoma were, and are Article 1, Section 10, and the Fourteenth Amendment.

5. The Act of Congress on which jurisdiction of this Court is invoked is Title 28, U.S.C.A., Section 344, and the cases believed to sustain jurisdiction are *Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 66 L. ed. 239, 42 S. Ct. Rep. 106; *Jett Bros. Distilling Co.* v. *Carrollton*, 252 U.S. 1, 64 L. ed. 421; *Western Turf Association* v. *Greenberg*, 204 U.S. 359, 27 S. Ct. Rep. 384, 51 L. ed. 520; *Memphis Nat. Gas Co.* v. *Beiler*, 62 S. Ct. 857, 315 U.S. 649, 86 L. ed. 1090; *Charleston Fed. Savings & Loan* v. *Alderson*, 65 S. Ct. 624, 324 U.S. 182, 89 L. ed. 857.

6. The Federal question is a substantial one as evidenced by the following considerations:

(a) The Federal question was the sole basis for the judgment of the Supreme Court of the State of Oklahoma.

(b) Said judgment was not a unanimous one. Mr. Justice Gibson prefaced his extended dissenting opinion by stating:

> "I think the importance of the question involved justifies this expression of the reasons why I cannot concur in the majority opinion.
>
> "I consider the effect of the opinion is to declare operative as a statute of limitation that which under the law cannot be imposed by the Legislature or recog-

nized by the courts as such; that same is violative of the obligations of contract which is inhibited by the Federal Constitution; that same is in contravention of the powers of the courts arising under grant by the Oklahoma Constitution; and that its overall effect is to place the approval of this Court upon what amounts to the repudiation by a sovereign state of a power held in trust."

(c) Said judgment is in direct conflict with the judgment of the United States Circuit Court of Appeals, Tenth Circuit, rendered November 17, 1942, *Hann* v. *City of Clinton*, 131 Fed. (2d) 978, in which the Oklahoma Legislative Act under attack was held to unconstitutionally impair the obligation of contract.

(d) Said Federal question is not precluded by other cases of this Court, all as set forth in our jurisdictional statement.

(e) The Federal question is governed by:

Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. ed. 403;

Seibert v. *Lewis*, 122 U.S. 284, 30 L. ed. 1161;

U. S. ex rel. Wolff v. *City of New Orleans*, 103 U.S. 358, 26 L. ed. 395;

Louisiana ex rel. Hubert v. *New Orleans*, 215 U.S. 170, 54 L. ed. 144, 30 S. Ct. 40;

County Court of Ralls County v. *U. S. ex rel. Douglas*, 26 L. ed. 1220;

Louisiana ex rel. Nelson v. *Police Jury*, 28 L. ed. 574;

Rees v. *Watertown*, 19 Wall. 107, 22 L. ed. 72;

Worthen Company, Trustee v. *Kavanaugh*, 79 L. ed. 638, 55 S. Ct. 555, 97 A.L.R. 905.

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STATEMENT OF THE CASE

This presents a situation wherein special assessment bonds issued in 1929, and the assessments pledged to the payment of said bonds were cancelled and extinguished by an Act of the Oklahoma Legislature in 1939, same being Senate Bill No. 164, set forth as Sections 242 to 242(o), Oklahoma Statutes Annotated 1941 (hereinafter referred to as O.S.A.).[2]

The question is whether or not said Act, and particularly Section 242, which purports to extinguish said bonds and said liens, and which extinguishes all remedies and methods of collection after the period prescribed in said Act is an impairment of the obligation of contract of appellant bondholder in violation of Article 1, Section 10, of the Constitution of the United States, and a taking of his property without due process in violation of the Fourteenth Amendment to the Constitution of the United States.

This action was commenced October 29, 1945, by filing in the District Court of Washita County, Oklahoma, a petition for injunction by W. F. Banks, a property owner, against Vernon Baccus, County Treasurer of Washita County, Oklahoma, to enjoin the County Treasurer from selling plaintiff's property for the special assessments securing appellant's bonds at the forthcoming November, 1945 tax sale (R. 9).

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[2]Act set forth in full in Appendix.

Plaintiff alleged that, during the year 1929, paving District No. 8 was created; that bonds[3] were issued dated March 16, 1929, payable solely from said special assessments; that the last of "said paving bonds, assessments, installments, interest and penalties, according to the face thereof, became and were past due and delinquent on March 17, 1939." Plaintiff alleged that "in 1939 the Legislature of the State of Oklahoma passed a law, being O.S. 1941, Title 11, Section 242, which reads, in part, as follows:

> "From and after the effective date of this Act, the right of any holder to enforce the lien of any street improvement bond issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, or of any street improvement bond or refunding street improvement bond issued under any authority contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, by foreclosure, mandamus, refunding or otherwise, shall be barred upon the expiration of three years immediately following the maturity date named in the face of such bond, unless the holder of any such bond shall have commenced suit to foreclose his lien by filing an action for that purpose and procuring service of summons therein or shall have evidenced his willingness to accept street improvement refunding bonds issued under the provisions of this Act, in exchange therefor, prior to the expiration of said three-year period of limitation; * * * The running of the period of limitation herein fixed shall be an absolute bar to any action or proceeding brought thereafter whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bond."

[3]All of said bonds are identical except for number, except Bond No. 1, which is in an odd amount.

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Plaintiff then alleged that the bondholders had not brought an action to foreclose nor evidenced their willingness to accept refunding bonds in exchange for said paving bonds, all as commanded in said Act; so that the bonds and the liens securing them no longer existed and were extinguished by said statute, by reason of which the county treasurer should be permanently enjoined from attempting to sell said property for said lien.

The county treasurer admitted the creation of the paving district, and that the liens were delinquent, and that he was about to sell the property for the purpose of satisfying said lien (R. ___).

Thereafter, A. F. Reeder, appellant herein, sought permission to intervene, asserting that he owned Bonds No. 34 to 39, inclusive, in said paving district, payable solely from special assessments levied in said district (R. 16). An order permitting intervention was made, the court stating:

> "* * * and that the proceeds of said sale, if conducted, will be applied to retire petitioner's bonds and therefore petitioner is vitally interested in the outcome of this litigation, and is therefore entitled to intervene"

Intervenor filed his answer asserting his ownership of the bonds, and admitting the delinquent assessments (R. 21). Intervenor further admitted that "the Legislature of the State of Oklahoma in the year 1939 enacted the statute alleged and referred to in plaintiff's petition, but petitioner alleges that the street improvement bonds issued as above set forth by said city were issued pursuant

to the 1923 paving law of the State of Oklahoma and that said law became a part of said bonds and that the said Act of the Legislature of 1939 is unconstitutional and void insofar as intervenor's bonds are concerned, for the reason that such Act of said Legislature is and was an attempt to impair the obligation of the contract; that said 1923 paving law provided, among other things, that the assessments made should and would become a lien against said property until the same was paid" (R. 22).

Thereafter, the plaintiff filed a demurrer to the answer of defendant and intervenor, asserting that neither of them stated a defense (R. 30 and 31), and the court entered its judgment sustaining the demurrer to the answer, and a permanent injunction was granted (R. 28). The court found in its judgment that "the sole and only question involved herein is the question of the constitutionality of the 1939 Act of the Legislature of the State of Oklahoma, the same being Section 242, Title 11, O.S. 1941, and the court further finds that said Act is constitutional and that said demurrer should in all things be sustained." The court then decreed that the county treasurer be permanently enjoined from selling the real estate involved for delinquent special assessments.

Notice of appeal from that judgment was given by Vernon Baccus, County Treasurer, and by the appellant, A. F. Reeder, who was intervenor below. In appellant's petition in error to the Supreme Court of the State of Oklahoma, he alleged, complaining of the Honorable Trial Court:

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"1. Said Court erred in sustaining the demurrer of plaintiff to the answer of the said Vernon Baccus, County Treasurer of Washita County, Oklahoma.

"2. Said Court erred in rendering judgment for plaintiff and granting the permanent injunction therein issued.

"3. Said Court erred in ruling that the Act of the Legislature of the State of Oklahoma passed in 1939, the same being Section 242, Title 11, O.S. 1941, is constitutional."

On Page 17 of brief of plaintiff in error (appellant here), in Case No. 32,427, in the Supreme Court of the State of Oklahoma, the following appears:

"PROPOSITION I[4]

"Senate Bill 164 O.S. 1939, Sections 242 to 242(o) inclusive, Title 11, O.S.A., is unconstitutional and void and therefore the judgment of the court is contrary to law."

And said brief further stated (R. 55a):

"It is our contention that the 1939 Act of the Legislature is unconstitutional and void insofar as it concerns special assessment bonds issued prior to its enactment, for the reason that it impairs the obligation of the original contract and deprives the bondholder of his due process of law as guaranteed by Section 15, Article 2 of the Constitution of Oklahoma, and Section 10, Article 1, of the Constitution of the United States, which said Acts are as follows: Section 10, Article 1, Constitution of the United States, provides as follows:

" 'No state shall * * * pass any bill of attainder, *ex post facto law*, or law impairing the obligation of contract * * *.'

[4]This was the sole proposition presented.

"Section 15, Article 2, Constitution of Oklahoma, provides:

" 'No bill of attainder, *ex post facto law*, nor any law impairing the obligation of contracts shall ever be passed.' "

In the aforementioned judgment of the Supreme Court of the State of Oklahoma, the judgment of the trial court in sustaining the demurrer and granting a permanent injunction was affirmed; and the Supreme Court concluded by holding that the Act violated neither the due process and equal protection clause, nor the contract clause of the State and Federal Constitutions.

The court held that the Act not only barred judicial proceedings, to-wit: foreclosure proceedings by the bondholders, but also barred tax sale proceedings by the county treasurer, which was the method enjoined by the court in this case, although this method of collection was exerciseable only by the county treasurer for the benefit of the bondholders. The court held this tax sale to be a "remedy" which had been extinguished by the 1939 Act. The court also held that the bondholder could not compel the performance of this "remedy" by the county treasurer by mandamus.

That court held that the extinguishment of the method of collection by the county treasurer was not an impairment of the obligation of contract but was merely a statute of limitations and was valid as to pre-existing rights, the court finding that the period of limitation was not unreasonable.

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The holding of the State Supreme Court may be set forth syllogistically as follows:

MAJOR PREMISE: *The tax sale proceeding* (provided for in the 1923 Act for collection of assessment liens created for payment of bondholders' bonds, and extinguished after the prescribed period by the 1939 Act) *was only a remedy*, separable from the substantive rights of the bondholders.

MINOR PREMISE: Remedies may be withdrawn or taken away within a prescribed period (such a taking is termed a statute of limitations) without impairing the obligation of contract or taking of property without due process of law, and upon the extinguishment of the remedy, the right may also be extinguished. The only condition is that the prescribed period be a reasonable one.

CONCLUSION: The prescribed period for withdrawal of said remedy herein was a reasonable one. Therefore, the remedy and the right were both extinguished and under the foregoing premises, such extinguishment did not violate either state or Federal constitutions.

The basic fallacy lies in the major premise, although the minor premise and conclusion are both incorrect.

The tax sale proceeding given under the 1923 Law is not a remedy separable from substantive rights regardless of how described, but is implicit in bondholders' right. It is "flesh and bone" thereof and the most important incident of bondholders' right. Therefore, the major premise is incorrect.

The minor premise is incorrect in stating that the right may be taken away with an extinguishment of the remedy because the right can never be taken away by subsequent legislation, that being the very thing prohibited by the Federal constitution (Art. 1, Sec. 10).

The conclusion is incorrect because, assuming the tax sale procedure to be a remedy, the period given the bondholder was not reasonable. A given period presupposes a right to avoid the bar of the statute and the bondholder had no such right.

NATURE OF CONTRACT INVOLVED HEREIN

We think it appropriate to make a brief preliminary statement in explanation of the nature of the contract right involved herein.

Appellant's bonds were issued pursuant to Chapter 173, Session Laws of 1923, Sections 1 to 35, which are set forth in the Oklahoma Statutes Annotated as Title 11, Sections 81 to 113, both inclusive, and 151 and 152.

After the creation of the district and the completion of the improvements, assessments are levied against the benefitted properties, and bonds, payable from said assessments, are delivered to the contractor in payment of his work (Title 11, O.S.A., Section 152). The provision of these bonds is set out in Title 11, O.S.A., Section 151. These bonds are not a liability of the city or town, but are payable solely from the special assessments (Title 11, O.S.A., Section 151).

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The bonds are bearer obligations and are payable in numerical order. The source of the fund from which the bonds are paid, to-wit: the assessments, are levied against the benefitted properties as provided in Title 11, O.S.A., Section 101. The property owner is given thirty (30) days to pay the assessment, and if not paid, same is payable in ten (10) annual installments. Title 11, O.S.A., Section 103. Said section also provides:

> "* * * Such special assessments, and each installment thereof and the interest thereon are hereby declared to be a lien against the lots and tracts of land so assessed from the date of the publication of the ordinance levying the same, co-equal with the lien of other taxes and prior and superior to all other liens against such lots or tracts of land, and such lien shall continue as to unpaid installments and interest until such assessments and interest thereon shall be fully paid * * *."

The first installment of said assessments is payable to the city clerk up to September 1 (Title 11, O.S.A., Section 105). If the installment is collected either by the city clerk or by the county treasurer, as hereinafter explained, the collecting official remits the funds to the city or town treasurer "who shall keep the same in a separate special fund for the purpose of paying the bonds and interest coupons thereon, issued against such assessments * * *" (Title 11, O.S.A., Section 105).

Assessments are payable to the city or town clerk as heretofore explained until September 1, and if not paid "it shall be the duty of the city or town clerk, promptly after the date of maturity of any such installment and

interest and on or before the fifteenth day of September in each year, to certify said installment and interest then due to the county treasurer of the county in which the city or town is located, which installment and interest shall be by said county treasurer placed upon the November delinquent tax list of the same year prepared by the treasurer of said county, and collected as other delinquent taxes are collected" (Title 11, O.S.A., Section 106).

These special assessments may be collected either by the county treasurer as hereinafter explained, or the bondholders may institute a foreclosure action (Title 11, O.S.A., Section 107), which can only be instituted after all of the ten installments are one year delinquent. *Hedges* v. *Groom*, 194 Okla. 384, 151 Pac.(2d) 936. By this method, however, the bondholder surrenders the co-equal lien inasmuch as the property must be sold subject to existing *ad valorem* taxes and other special assessments (Title 11, O.S.A., Section 107).

The provisions for the sale by the county treasurer are by a county or November sale each November (Title 68, O.S.A., Sections 381, 382 and 383), followed by a resale (Title 68, Section 432), after an intervening two-year period of redemption. The delinquent assessments after certification to the county treasurer are delinquent taxes to be collected just as *ad valorem* taxes [*Oklahoma City* v. *Vahlberg*, 185 Okla. 28, 89 Pac.(2d) 962].

These installments bear 12% penalty after delinquency.

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The quality of the *ad valorem* tax, with which the special assessment lien is co-equal, is set out in Title 68, O.S.A., Section 353, as follows:

> "Taxes upon real property are hereby made a perpetual lien * * *."

The co-equality clause is also construed in *McGrath* v. *Oklahoma City*, 156 Okla. 34, 9 Pac.(2d) 711. The constitutionality of said co-equality clause was sustained in *Board of County Commissioners of Seminole County* v. *City of Wewoka ex rel. North*, 191 Okla. 142, 127 Pac. (2d) 826. Other cases recognizing the co-equal lien of the special assessments are as follows:

Board of County Commissioners of Seminole County v. *City of Wewoka ex rel. Merten*, 191 Okla. 233, 129 Pac.(2d) 83;
Town of Medford ex rel. Fuss v. *Early*, 194 Okla. 566, 153 Pac.(2d) 633;
Service Feed Company v. *City of Ardmore*, 171 Okla. 155, 42 Pac.(2d) 853;
Boles v. *Aikman*, 157 Okla. 172, 11 Pac.(2d) 479;
Runnels v. *Citizens National Bank*, 157 Okla. 94, 11 Pac.(2d) 173;
Settles v. *Frakes*, 156 Okla. 53, 9 Pac.(2d) 768;
Criswell v. *Hart*, 155 Okla. 159, 8 Pac.(2d) 70;
Bradford v. *Schumucker*, 135 Fed.(2d) 991;
Hann v. *City of Clinton*, 131 Fed.(2d) 978.

To determine the contract received by the bondholders, we look to the laws existing at the time of the issuance of the bonds, which entered into and became a part of the contract and constitute the obligation thereof.

Nelson v. *Pitts*, 126 Okla. 191, 259 Pac. 533, 53 A.L.R. 1137;

Straughan v. *Berry* 179 Okla. 364, 65 Pac. (2d) 1203;

Davis v. *McCasland*, 182 Okla. 49, 75 Pac. (2d) 1118;

Hann v. *City of Clinton*, 131 Fed. (2d) 978, (10th Circuit), 275 Fed. 747;

Moore v. *Otis*, 275 Fed. 747;

Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. ed. 403;

Worthen Co. v. *Kavanaugh*, 79 L. ed. 638, 55 S. Ct. 555, 97 A.L.R. 905;

Louisiana ex rel. Hubert v. *New Orleans*, 215 U.S. 170, 54 L. ed. 144, 30 S. Ct. 40.

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ARGUMENT

In answering the motion to dismiss or affirm, we shall endeavor to first follow the six numerical propositions urged in the first motion to dismiss. We will then consider numerical propositions seven to ten in the supplemental motion to dismiss.

In all instances, appellees have not recited separate statements of their separate propositions, so we have endeavored to state their respective propositions in our own language, and we have then endeavored to answer appellee's propositions as we have stated them.

PROPOSITION I

The defendant in the trial court did not, in that court or in the State Supreme Court on appeal, raise the constitutional question here sought to be raised by the intervener, A. F. Reeder, and for that reason said intervener cannot now do so.

The defendant in the trial court was the County Treasurer of Washita County, Oklahoma. Said county treasurer is an administrative officer, and charged with the duty of collecting taxes. The special assessment installments involved were certified to him by the City Clerk of Cordell, Oklahoma, to "be by said county treasurer placed upon the November delinquent tax list of the same year prepared by the treasurer of said county, and collected as other delinquent taxes are collected" (Title 11, O.S.A., Section 106). The provisions for the sale of other taxes

are by a November or preliminary sale (Title 68, O.S.A., Section 383), followed by a resale after a redemption period of two years (Title 68, O.S.A., Section 432).

The county treasurer has no personal interest in the controversy and it is his duty to remit the assessments and interest collected to the city or town treasurer (Title 11, O.S.A., Section 105), who places the funds in a separate special fund for the purpose of paying the bonds and interest coupons thereon.

For the foregoing reasons, the county treasurer was not entitled to raise the constitutional question. *City of Shawnee* v. *Taylor*, 191 Okla. 687, 132 Pac.(2d) 950. Nor has he any standing to raise same in this Court. *Braxton County Court* v. *West Virginia*, 208 U.S. 192, 52 L. ed. 450, 28 S. Ct. 275; *Stewart* v. *Kansas City*, 239 U.S. 14, 60 L. ed. 120, 36 S. Ct. 15; Volume 10, Second Edition, Section 5001, *Cyclopedia of Federal Procedure.*

However, a lack of interest that may disable the county treasurer from raising a defense in a proper case would obviously not disable a person possessed of the necessary interest. Our pleading did not enlarge the issues in the case, but, as an interested party, we were in no way disabled from raising the constitutional question. The intervener in the trial court, whose assessments were payable solely from the special assessment bonds is a proper party appellant. *City of Savannah* v. *Jesup*, 106 U.S. 563, 27 L. ed. 276; *Ex parte Jordan*, 94 U.S. 248, 24 L. ed. 123; *Hassall* v. *Wilcox*, 29 L. ed. 504, 115 U.S. 598; Volume 6, *Cyclopedia of Federal Procedure*, Section 2404, Page

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511; Volume 10, Second Edition, Section 5006, *Cyclopedia of Federal Procedure*, Page 473.

PROPOSITION II

Consideration of the constitutional question herein presented was not necessary in the State Supreme Court, in order to affirm the judgment of the trial court, because the paving lien sought to be enforced by intervener, appellant herein, had been extinguished by lapse of time and laches, as provided by Oklahoma statute enacted prior to the issuance of said paving bonds and upheld by the Oklahoma Supreme Court decisions which have never been reversed or modified.

Appellee asserted not that the judgment of the State court was grounded on a non-Federal question but that same might have been decided on a non-Federal question. Of course, what might have been considered by the State Supreme Court is not determinative of the question. *International Steel and Iron Company* v. *National Surety Company* (Tenn., 1936), 56 S. Ct. 619, 297 U.S. 657, 80 L. ed. 961. The only controlling question is whether or not there was in fact drawn in question the validity of a state statute as repugnant to the United States Constitution by the highest court of a state, and that decision was in favor of its validity. *State of Indiana ex rel. Anderson* v. *Harry Brand, Trustee*, 303 U.S. 95, 82 L. ed. 685, 58 S. Ct. 443, 113 A.L.R. 1482:

> "Where a state court does not decide against a petitioner or appellant upon an independent state ground, but, deeming a Federal question to be before it, actually entertains and decides that question adversely to

> the Federal right asserted, the Supreme Court of the United States has jurisdiction to review the judgment, if it is a final judgment; and cannot refuse jurisdiction because the state court might have based its decision, consistently with the record, upon an independent and adequate non-Federal ground."

However, appellees' contention is otherwise incorrect and is prejudicial and we should like to answer it.

The appellee is now arguing that, under Section 23, Title 42, O.S. 1941:

> "A lien is extinguished by the mere lapse of time within which, under the provisions of civil procedure, an action can be brought upon the principal obligation."

Appellee argues that this statute applies to taxes and was in existence at the time of the creation of the paving bonds, and that the Supreme Court of the State of Oklahoma might have held that, under this statute, our tax liens were extinguished. Aside from the fact that such a discussion is not appropriate here and is highly speculative, such a decision by the Supreme Court of the State of Oklahoma was not only precluded by decisions prior to the *Baccus case* and subsequent thereto, as hereinafter shown, but such a decision was precluded by the court's conclusions of law in the *Baccus case*. We quote from Page 11 of the opinion of the Supreme Court of the State of Oklahoma:

> "At the time of the enactment of the 1939 Act, there was no statute of limitations applicable to the sale and resale by the county treasurer of property to satisfy street improvement liens, and at that time this Court had not decided that the general statute of limitations applied to actions to foreclose such liens. The case of *City of Bristow* v. *Groom*, 194 Okla. 384,

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151 Pac. (2d) 936, so holding, was not decided until 1944."

The Supreme Court of the State of Oklahoma did not, of course, rely on said statute but stated that the provisions of Section 242 of the 1939 Act were "consistent" with Section 23, Title 42. The court mentioned this statute again on Page 16 of its opinion as illustrative of that class of statute of limitations which extinguish both the remedy and the right. It is admitted that the court did not rely on this statute but predicated its judgment throughout on the extinguishment afforded by the 1939 Act.

However, in the case of *City of Healdton ex rel. Rewoldt* v. *Pickens*[5], No. 32,570, decided January 6, 1948, reported in Oklahoma Bar Journal, January 10, 1948, Page 10, Vol. 19, No. 1, the court specifically said:

> "Liens on lots for street paving assessments are subject to enforcement by civil actions in the district court to foreclose the liens, or by tax sale proceedings by the county treasurer in the same manner as for enforcement of liens for other taxes. Tax sale proceedings for enforcement of such liens by the county treasurer do not constitute a civil action, and the provision of 42 O.S. 1941, Section 23, that 'A lien is extinguished by the mere lapse of time within which, under the provisions of civil procedure, an action can be brought upon the principal obligation,' has no application to liens for paving assessments, and when a civil action to foreclose a paving assessment lien is barred by the general statute of limitations the lien is not thereby extinguished."

Our Court obviously could not apply this statute to paving assessments because of the provisions of 11 O.S.

[5]Pending on petition for rehearing.

1941, Section 103, making the lien of paving assessments "co-equal" with the lien of other taxes, and providing that "such lien shall continue as to unpaid installments and interest until such assessments and interest thereon shall be fully paid."

It was pointed out in the *Rewoldt case* as in previous cases that:

> "It is affirmatively declared by statute that the lien on real estate for delinquent *ad valorem* taxes does not expire by lapse of time. Such lien continues until the taxes are paid or until the real estate is sold by the county treasurer for the delinquent taxes. By Section 103, *supra*, the lien for paving assessments is given the same quality as a lien for *ad valorem* tax and such lien may be discharged in like manner as a lien for *ad valorem* tax. *Settle* v. *Frakes et al.*, 156 Okla. 53, 9 Pac. (2d) 768. It was also held in *Settle* v. *Frakes et al.*, that the failure of the county treasurer to offer for sale and sell real estate for delinquent paving assessments does not discharge the lien."

Title 42, O.S. 1941, Section 23, was part of the general lien laws, and the court had previously held in *Bailey* v. *Oklahoma City*, 157 Okla. 96, 11 Pac. (2d) 113, that the general lien laws had no application to taxes of this character.

It is true that this statute was mentioned in *Board of Education* v. *Johnston*, 189 Okla. 172, 115 Pac. (2d) 132, but this, of course, was *dictum*. In substance, the case of *Board of Education* v. *Johnston, supra*, was completely overruled by *Wilson* v. *City of Hollis*, 193 Okla. 241, 142 Pac. (2d) 633.

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PROPOSITION III

The intervener below and appellant herein did not have sufficient interest in the subject matter of the action because this Court has no way of knowing "that there was and is not sufficient funds in the city clerk's hands, collected from other lots in said district with which to pay intervener's bonds * * *."

However, this is a matter that we must presume was considered by the trial court in permitting intervention, and the trial court could not have permitted the intervention and determined that the bondholder was a proper party intervener without determining such preliminary matters. In the application to intervene, we asserted that the proceeds of the sale would be applied to the payment of our bonds, and the court specifically found, in permitting intervention, that:

> "* * * the proceeds of said sale, if conducted, will be applied to retire petitioner's bonds and therefore petitioner is vitally interested in the outcome of this litigation, and is therefore entitled to intervene."

This was, of course, the equivalent of a finding that our bonds were outstanding. Moreover, on demurrer in the lower court our bond ownership was admitted. This admission includes the inference that the bonds are outstanding and unpaid.

PROPOSITION IV

The appeal is frivolous because the question has been repeatedly decided by this Court against our contention.

In this proposition appellee asserts that:

"A lien and a statute of limitations are parts of the remedy, and not the right, and that a new statute, creating or changing a limitation, and extinguishing the lien when no action is taken to enforce the lien within the time allowed, when a reasonable time to do is given in the new statute, does not violate the obligation of any contract."

In the first place, it must be remembered that:

"Under the inhibition in the Federal Constitution as to legislation impairing the obligation of contracts, it is immaterial whether the obligation of a contract is impaired by acting on the remedy or directly upon the contract. Impairment in either case is prohibited by the Constitution. Hence, while it is now established beyond question that the remedy within certain limits may be altered or modified, according to the will of the State, even though such statutes in certain cases may have a retrospective effect and to some extent incidentally affect vested rights, the alteration cannot, however, go to the extent of impairing the obligation of the contract" 12 Am. Jur., Section 432, Page 69 (citing cases).

Thus, the law seems to be clear that remedies might be changed so long as the obligation of the contract is not impaired, but if the change of the remedy amounts to an impairment of the obligation of contract, either because the remedy is so interwoven with the contract that right and remedy are inseparable, or otherwise, the statute must fail.

In other words, the foregoing cases hold that even a remedy may not be altered or withdrawn when the right

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is affected by the alteration or change in the remedy. However, we believe that the statute here, as construed by the Oklahoma Supreme Court, does not fall within the scope of the principles permitting changes in the remedy for the following reasons:

(1) The 1939 Act here, same being subsequent Legislation, extinguishes the rights[6] as well as the remedy, and, therefore, amounts to an impairment of the obligation of contract.

(2) The provision for satisfaction of the special assessment lien by tax sale is not a remedy possessed by the bondholder, but a power in trust possessed by and exercisable only by the county treasurer for the bondholders' benefit and this is either a part of the right or connected therewith as to be incapable of separation from the right without destruction thereof.

(3) If the tax sale proceeding, however, were considered to be a remedy or the equivalent thereof, then same could not be constitutionally withdrawn without giving the bondholders a reasonable time within which to enforce their obligation. Any reasonable time given, however, would be meaningless because the law would not permit the bondholders to take any steps to collect their lien as the tax sale could be conducted only by the county treasurer.

Appellees contend that the law here is labeled or termed a limitation Act and, therefore, is purely remedial. We believe, however, that labels or names are not important and that whether or not the law professes to apply to the contract or to the remedy is unimportant if it in effect impairs the obligation of existing contracts. 12 Am. Jur., Section 432, Page 71, Notes 12 and 13.

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[6]Section 242 absolves the property of the assessment lien.

It is said in the case of *Barnitz* v. *Beverly*, 163 U.S. 118, 41 L. ed. 93, 16 S. Ct. 1042, in which the court quoted from another case:

> "The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made. These are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party, and the right acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated, the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance by the remedies then in force. If any subsequent law affect to diminish the duty or impair the right, it necessarily bears on the obligation of the contract in favor of one party to the injury of another; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

And it is said in *Curran* v. *Arkansas* (U.S.), 15 How. 304, 14 L. ed. 705:

> "But it by no means follows that because a law affects only the remedy, that it does not impair the obligation of the contract. The obligation of a contract in the sense in which those words are used in the Constitution is that duty of performing it which is recognized and enforced by the law. And if the law is so changed that the means of legally enforcing this duty are materially impaired the obligation of the contract no longer remains the same."

The cases relied on by appellee referring to the reserve power to change the remedy are simply cases where the changes would not materially affect the obligation of con-

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tract, and, in some instances, were in furtherance of the public welfare.

It must remembered that, when the bonds are delivered to the paving contractor as provided in Title 11, O.S.A., Section 152, in payment of his work of street improvement, the assessment liens have been created and the bond merely consists of a funding of the property owners' obligation. The bondholders' sole "right" is the collection of these bonds and the proceedings for enforcement thereof are merely provisions for the collection of said bonds. Inasmuch as the assessment against the property has already been created and inasmuch as the assessment is the sole means of payment, the only remaining right of the bondholder is the right of collecting those assessments, and the only provisions for the collection of those assessments are by tax sale and foreclosure. Foreclosure was barred to this bondholder under the case of *Hedges* v. *Groom*, 194 Okla. 384, 151 Pac. (2d) 936, decided in 1944, although this was not known at the time of the passage of the 1939 Act, and we are not concerned with that method. We are, therefore, only concerned with the cumulative method.[7] And the only rights we are concerned with, therefore, are the rights possessed by the bondholder under this proceeding. What are these rights? They are set forth in *McGrath* v. *Oklahoma City, supra.* We quote from Page 39:

[7]This method was held to be cumulative in the case of *Service Feed Company* v. *City of Ardmore*, 171 Okla. 155, 42 Pac. (2d) 853.

> "The ultimate rights under a lien for improvements and a lien for taxes are identical. What is that right? To have the property sold by the county treasurer at public sale and thereby recover as much as possible of the amount due."

We think it elementary that a tax without the means of enforcement is a nullity. It is stated in *Woods* v. *State*, 125 Okla. 287, 250 Pac. 778, 53 A.L.R. 1128:

> "That right of the sovereign to collect taxes is necessarily included in the power of taxation."

If the 1939 Act, therefore, either extinguished our right to have the property sold at tax sale or obstructed it, it struck at the most important incident of said right. The 1939 Act did not purport to be remedial as contended by counsel, for in Section 242, it is stated:

> "The property is absolved of the lien."

In our jurisdictional statement, we demonstrated that the right to have the property sold at tax sale was not a remedy regardless of how labeled, but was merely a method of collection guaranteed us by the Act and which was possessed by the county treasurer for our benefit, as a power in trust. In other words, we merely had a right to have the county treasurer exercise the power of trust enjoined upon him. If this is withdrawn, it withdraws a right from us and not a remedy, for we possess none. Furthermore, although it purports to give us a period of time to act, this was meaningless because we could not advertise the property or conduct a tax sale, as this power was vested solely in the county treasurer.

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PROPOSITION V

The validity of the 1939 Act was preserved by the following proviso: "Provided, however, that in all cases where the period of limitation herein mentioned has expired or will expire prior to November 1, 1939, the holder of such bonds shall have until December 1, 1940, in which to pursue his remedy or obtain the benefits of this Act."

The Supreme Court stated that the bondholders were given eighteen months after the effective date of the Act within which to pursue "all such remedies." However, we have already pointed out that, under the laws existing at the time of the creation of the lien, same were collected as other taxes were collected by the county treasurer. We could not institute any proceeding directly to collect these liens except by foreclosure, which was already barred and which is not under discussion. The period given us was, therefore, meaningless to us.

It was at all times obligatory on the county treasurer to sell the property for taxes.

We have heretofore described the procedure for sale of property by the county treasurer for delinquent taxes.

Although it was at all times mandatory on the county treasurer to sell property for taxes, the 1939 Legislature, which revised the tax code, specifically provided that:

> "Any county official charged with any duty in connection with the holding of delinquent tax sales and tax resales who fails to perform such duty, shall be guilty of malfeasance in office and upon conviction thereof shall be removed from office. * * *" Title 68, O.S.A., Section 432n.

By Title 68, O.S.A., Section 432o, it was made the duty of the Attorney General of the State of Oklahoma to file proceedings for the removal of any official who "fails to make provision for the holding of such tax sales and tax resales or to hold such tax sales and tax resales as provided by law."

Thus, the bondholders had a right to assume that the laws would be followed and that the tax sales for his lien would be conducted in the same manner as for the co-equal lien of *ad valorem* taxes. This promise remained in full force and effect until the three-year period following the maturity date of the bonds, provided for in the 1939 Act, and was at all times in effect. It is urged that the three-year period, or 18 months and nineteen-day period, given was an adequate period for us to take action and that this preserved the constitutionality of this law. However, we have already pointed out that there was no action that we could take during this period, as the sole action was vested in the county treasurer. We could not advertise the property for taxes, nor could we sell the property, and that, of course, is the primary right with which we are concerned.

But it is suggested by the Supreme Court of the State of Oklahoma that an action to compel the county treasurer to do his duty would toll the statute of limitations. We must remember, however, that the primary right taken away from us is the right to have the county treasurer sell the property for taxes. It was never the obligation of the bondholders to execute the laws, as the bondholders were promised that the laws would be executed for their bene-

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fit in the same manner as for the benefit of the holders of municipal obligations payable out of general taxes.

To justify the withdrawal of the primary right, to-wit: the right to have the property sold by the county treasurer, because of the failure of the bondholders to make the county treasurer perform his duty, would be a complete shift of responsibility and alteration of the contract. The bondholders, of course, had no facilities for determining what properties were delinquent, as that information was a part of the records in the office of the county treasurer. The bonds were widely scattered and, in many cases, owned by non-residents. The only promise made by the bonds was that assessments in varying amounts had been levied against respective properties and that same would be collected in the manner provided by the laws existing at the time; that the proceeds thereof would be remitted to the city treasurer and commingled in the paving fund, from which the bondholders would be paid in the manner provided by law. Thus, the bondholders had no way of knowing which property was sold and which properties the county treasurer had failed to sell. This would require an audit of the records in the office of the county treasurer and the city clerk.

The right to have this handled in an orderly manner by the county treasurer as provided for the sale of property for other taxes was the most valuable right enjoyed by the bondholders. The bondholders, at all times, knew that if the county treasurer failed to sell assessments for one

year, he would sell for another, and the lien would not be lost by his failure to sell for one year. *City of Healdton ex rel. Rewoldt* v. *Pickens, supra.*

We must bear in mind that the "remedy" referred to by appellees is the primary "right" to have the county treasurer sell the property. If the Act is constitutional, this primary right is withdrawn from us.

The law under which the bonds were issued did not provide that "the county treasurer shall sell the property at tax sale, but if the county treasurer fails to do so, the bondholder shall compel him to conduct the tax sale." There was no secondary responsibility or obligation on the bondholder of any kind. The primary and exclusive obligation was cast on the county treasurer. Appellees claim, however, that the responsibility for the sale of the property by the county treasurer was shared by the bondholders, but this idea is negated by the terms of the laws under which the bonds were issued. The bondholders' right to institute a mandamus action[8] is simply a recourse offered by the law to any aggrieved citizen, but is not the primary right with which we are concerned. In this case, the primary right is the right to have the property sold at tax sale, and the remedy incident to that right is the

[8]If we were compelled to mandamus the county treasurer to advertise and conduct his November tax sale, were we also compelled to mandamus him to conduct his subsequent May resale? Suppose we instituted one action and did not institute the subsequent action. Suppose our action (either of them) were filed too late to have the required pre-sale publication. Do we then lose our right? Suppose the Court denied our mandamus. Inasmuch as any appeal therefrom would be moot because the time for the sale would have passed before the appeal could be presented, would we have then lost our rights? Was it our responsibility to mandamus on every possible occasion while the county treasurer lay completely dormant?

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tax sale. That is the right and the remedy with which we are concerned.

It is to be noticed that the 1939 Act itself did not require the filing of a mandamus action against the county treasurer by the bondholders. It provided that the rights of the bondholders shall be barred upon the expiration of three years, unless the holder of any such bond shall have commenced suit to foreclose his lien by filing an action for that purpose and procuring service of summons thereon or shall have evidenced his willingness to accept Street Improvement Refunding Bonds issued under the provisions of this Act, in exchange therefor, prior to the expiration of said three-year period of limitation * * * (Title 11, O.S.A., Section 242).

Thus, the bondholder had two things that he could do to the assessment liens. He could file a foreclosure action, but that was a cumulative remedy which he did not have to use. *Service Feed Company* v. *City or Ardmore*, 171 Okla. 155, 42 Pac.(2d) 853. If he filed a judicial foreclosure, he surrendered his co-equality. See nature of contract involved herein.

Furthermore, judicial foreclosure was barred by the general statute of limitations at the time this action was instituted in Washita County, Oklahoma. *Hedges* v. *Groom, supra.* The only thing left for this bondholder, therefore, under this Act was to file an agreement to accept refunding bonds, which he did not do and which he should not be compelled to do. To exchange the executed right, to-wit: his bonds, for the completely executed rights

offered under the 1939 Act would not be to afford the equivalent of what he surrendered. For a detailed consideration of this, see our jurisdictional statement where we have compared the rights given to the bondholder under the laws under which the bonds were issued and the rights offered by the 1939 Act.

We possessed no remedy to avoid the bar of the statute because that remedy was exercisable only by the county treasurer and constituted a right to us which we may term a power in trust exercisable only by the county treasurer. And which could not be withdrawn. *Von Hoffman* V. *Quincy, supra.*

What was done, no matter how it is viewed, was simply a withdrawal of the power in trust. This is no different than the case of *Von Hoffman* V. *Quincy, supra.*, and *Seibert* V. *Lewis, supra.* In the *Von Hoffman case,* the limit of the levy necessary to pay the bonds was diminished. In our case, the right to collect the tax was withdrawn. Inasmuch as a tax without a power of collection is of no value, the cases are practically identical. The only other difference is that, in our case, it was done *in futuro,* but in the meantime, we are just as helpless as we were at all times to collect our lien.

The bondholder was not charged with any of the functions of government, nor with any responsibility for their exercise.

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PROPOSITION VI

Appellees' sixth proposition is considered in our answer to other propositions and requires no further discussion here.

PROPOSITION VII

Appellees' seventh proposition set forth in their supplemental motion to dismiss appeal is merely a supplemental statement of facts and requires no further comment.

PROPOSITION VIII

The record fails to show that any Federal question involving the obligation of contracts was necessarily decided by the Oklahoma Supreme Court.

We have heretofore delineated the contract on which we rely. Appellees argue that the assessment lien is a liability created by statute. We have no quarrel with that statement, as we do not contend that the tax imposed on the property owner is a contract. The parties to the contract are the city, acting under its constitutional authority, on the one hand and the bondholders on the other hand. The general rule is stated in 43 Am. Jur., Page 276, Public Securities and Obligations, Section 9, as follows:

> "Public bonds, including the bonds issued by the various states of the Union and their political subdivisions, have been uniformly and consistently held to constitute contracts within the purview of provisions of the Federal and State Constitutions prohibiting laws impairing the obligation of contracts."

Appellees further argue that, in the event this is a contract, the obligation was "(1) that the bondholder

should receive his money when the bonds became due and (2) in the event of the failure of the property owner to pay the assessment from which the bondholder was paid that the bondholder could enforce payment by (a) tax sale and resale procedure under 11 O.S. 1941, Sec. 106, and (b) foreclosure in the district court as provided by 11 O.S. 1941, Sec. 107."

This is not correct. In the event the property owner fails to pay, the county treasurer was obliged to initiate and conduct the tax sale. The bondholder, of course, has no right to enforce payment by a sale of the property, although the assessment fund is the sole source of his payment. The assessment liens are controlled and collected by the county treasurer, and the proceeds of the collection are paid into the paving fund, which is the fund to which the bondholder looks.

PROPOSITION IX

The record fails to show that any Federal questions involving a denial of due process of law or equal protection were necessarily decided by the Supreme Court of Oklahoma.

It is our contention that the 1939 Act, as construed by the Supreme Court of the State of Oklahoma, constitutes a taking of our property without due process of law prohibited by the Fourteenth Amendment, as well as an impairment of the obligation of contract prohibited by Article 1, Section 10, of the United States Constitution.

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PROPOSITION X

The record does not present for decision any substantial Federal question for the reason that identical questions have been decided adversely to appellants' claims by the United States Supreme Court.

We have heretofore discussed the tenth proposition. We note that counsel continuously refers to Title 42, O.S. 1941, Section 23, although this was not involved in the *Baccus case.*

This statute has no reference to tax liens.[9] It is to be noticed that this statute only refers to a lien upon which an action can be brought. A sale by the county treasurer is, of course, not a judicial action or proceeding that can be brought by anybody. The Oklahoma Supreme Court had occasion to consider the statute of limitations in *Hedges* v. *Groom, supra.* In that case, they held that the general statute of limitations, to-wit: the three-year statute provided for suits upon a liability created by statute, said general statute of limitations being in existence at the time of the creation of the paving district, was applicable to a judicial foreclosure. The Court held, however, that the lien still existed, and that only a judicial foreclosure was barred. This was no more than a restatement of prior decisions. Substantially the same statement was made in this case by the Supreme Court of the State of Oklahoma, and, as we have heretofore shown, it has been made in

[9]Taxes are not debts and no action lies for their collection. In this connection see *Boeing Airplane Co.* v. *Board of County Commissioners of Sedgwick County* (Kans.), 188 Pac. (2d) 429.

numerous other cases, including the *Healdton case, supra,* decided after the *Baccus case.*

This statute does not apply to a special assessment tax any more than it does to its co-equal tax, and *ad valorem* tax. Both the lien and the duty of enforcing the lien continues in both cases, and the Legislature was powerless to extinguish the lien or obstruct the means of its enforcement.

They rely on the cases of *Wheeler* v. *Jackson,* 137 U.S. 245; *Terry* v. *Anderson,* 95 U.S. 628, 24 L. ed. 365; *Turner* v. *People of the State of New York,* 168 U.S. 89; *National Surety Company* v. *Architectural Decorating Company,* 226 U.S. 275.

We have discussed *Wheeler* v. *Jackson* in our jurisdictional statement.

The basic distinctions between the *Wheeler case* and that now before this Court are as follows:

(a) In the *Wheeler case,* the New York Legislature did not seek to put a limitation on the right of the Registrar of Arrears to sell the property for taxes as was done here under the 1939 Act.

(b) It was reasonable to compel the certificate holder to perfect a right which he had acquired under the New York Act, because the execution of this right was within his power and control; whereas, here the right to sell this property at a tax sale was controlled only by the county treasurer.

(c) It was reasonable to withdraw the right from the New York certificate holder for his failure to assert his

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right, but it is not reasonable to withdraw the rights given us to have our lien sold by the county treasurer, for his dereliction of duty.

(d) The tax sale proceeding here is not a remedy possessed by the bondholders that may be withdrawn on reasonable notice, but a power in trust possessed by the county treasurer.

(e) Here, unlike the situation in the *New York case*, the three (3) year period [or the eighteen (18 month and nineteen (19) day period] given to the bondholders under the 1939 Act was meaningless, because the bondholders had no power or authority to avoid the extinguishment of their right by taking any action to satisfy their lien.[10]

It should be noted that the third syllabus in *Wheeler* v. *Jackson* speaks of rights of a statute of limitations "in its application to an existing right of action." The statement of law presupposes a right of action to which a statute of limitations is incident.

We have also discussed *Terry* v. *Anderson* in our jurisdictional statement.

With reference to *Turner* v. *People of the State of New York*, the statute involved in this case related to land sold to the state for non-payment of taxes. It provided that tax deeds which had been on record for two years prior to the passage of the Act were vulnerable

[10]In addition to the foregoing distinctions, the 1939 Act imposed a new condition and placed a new responsibility on the bondholders, by holding that the bondholders could have avoided the statute by commencing a mandamus suit, the court in effect held that it was the bondholders' duty to compel the county treasurer to perform his statutory duty.

against attack unless assailed within six months. It applied to cases only in which the conveyance had been of record for two years. Furthermore, the plaintiff in this case had had eight years since the sale and three years since the recording of the deed during which he might have asserted his title. He had a right which the statute of limitations could operate on. It was pointed out that the courts had uniformly held that he had a remedy which the statute operated on. Here, we had no remedy upon which a statute of limitations could operate. As before pointed out, we could not make up the tax rolls, advertise the property, conduct the tax sale and execute a deed; all we could do was rely on the promise of the law that this would be done. Our primary right was to have it done, and the remedy incident to that right was the proceeding by the county treasurer.

They also rely on *National Surety Company* v. *Architectural Decorating Company*, 226 U.S. 275. This cause of action originated in Minnesota, and was a suit upon the public contractor's bond. The law in force at the time the bond was executed and delivered provided that no action could be commenced upon the bond unless within ninety days after performing the last item of work or furnishing the last item of skill, tools, machinery or material, the claimant should serve upon the principal and his surety a written notice specifying the nature and amount of his claim. An action was to be begun within one year after the cause of action accrued. The Act was later amended to provide for the presentation of the claim within

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ninety days after the completion of the contract and acceptance of the building by the proper public authorities, and the court held that this amendment did not constitute an impairment of the obligation of the contract, inasmuch as the same was simply a modification of the remedy provided in the original statute.

This case is governed not by the cases relied on by appellees but by the following cases:

Von Hoffman v. *Quincy*, 4 Wall. 535, 18 L. ed. 403;

Seibert v. *Lewis*, 122 U.S. 284, 30 L. ed. 1161;

U. S. ex rel. Wolff v. *City of New Orleans*, 103 U.S. 358, 26 L. ed. 395;

Louisiana ex rel. Hubert v. *New Orleans*, 215 U.S. 170, 54 L. ed. 144, 30 S. Ct. 40;

County Court of Ralls County v. *U. S. ex rel. Douglas*, 26 L. ed. 1220;

Louisiana ex rel. Nelson v. *Police Jury*, 28 L. ed. 574;

Rees v. *Watertown*, 19 Wall. 107, 22 L. ed. 72;

Worthen Company, Trustee v. *Kavanaugh*, 79 L. ed. 638, 55 S. Ct. 555, 97 A.L.R. 905,

all of which are cited and discussed in our jurisdictional statement.

It is important to observe that the promise made by existing laws was a lien co-equal with the lien of *ad valorem* taxes. The *ad valorem* tax lien has not been assailed, nor has the procedure for its collection been altered

or diminished in any way. It cannot be denied that to extinguish our special assessment lien and to destroy the method for its collection without in any way impairing the *ad valorem* lien is to destroy the promised co-equality.

In our "Statement of Grounds on Which Jurisdiction of Court is Invoked," we enumerated five reasons why the Federal question here was a substantial one.

With further reference to these reasons, there can be no doubt that there was drawn in question by the Supreme Court of the State of Oklahoma the validity of the 1939 Act on the ground of its being repugnant to the Constitution of the United States (Art. 1, Sec. 10, and the Fourteenth Amendment), and that this was the sole basis of the judgment of the Supreme Court of the State of Oklahoma.

With reference to Mr. Justice Gibson's dissenting opinion, there is, of course, nothing that we could say to add to this. In our judgment, it was a correct statement of the law that should have been announced by the State Supreme Court.

With reference to the case of *Hann* v. *City of Clinton*, 131 Fed. (2d) 978, decided by the United States Circuit Court of Appeals, Tenth Circuit, November 17, 1942, too much stress cannot be placed on this case in a consideration of this motion to dismiss. Surely the question can not be an insubstantial one if the United States Circuit Court of Appeals held that said 1939 Act impaired the obligation of contract of bondholders similarly situated. To argue that the question is insubstantial in the light

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of this opinion, is to treat the unanimous opinion of the Circuit Court of Appeals as frivolous. We would remind the Court that in *Hann* v. *City of Clinton*, as here, the bonds were issued under the 1923 Act, and the first question to be determined by the court was whether or not the lien had been extinguished by the 1939 Act. The action arose on a judicial foreclosure, and here it arose on a tax sale. The judicial foreclosure was the remedy afforded to the bondholder and the tax sale was the method exercised for the bondholder's benefit. These methods were described as co-equal remedies by the Oklahoma Supreme Court. The question in *Hann* v. *City of Clinton* is identical in all respects to the question before the Court here except for the detail pointed out. The constitutionality of the 1939 Act was the sole basis of the opinion of the Circuit Court of Appeals aside from the formal questions.

It must be remembered that the primary and basic question decided by the Circuit Court of Appeals, to-wit: the existence of a lien is also the primary and basic question here. This is true because both a right of judicial foreclosure and a right of tax sale obtain only in the event a lien exists.

Needless to say, the dismissal of this appeal as frivolous without a consideration of the merits would leave the law relating to special improvement bonds in a chaotic condition in this State. Let us illustrate. The 1939 Act repealed, expressly or by implication, Title 11 O.S.A., Sections 221 to 240, same being the 1927 Refunding Law.

Thus, if the 1939 Act is valid, bonds can only be refunded under the 1939 Act. This, of course, is impossible because the refunding provisions of the 1939 Act, Sections 242 to 242o were repealed by the 1947 Legislature.

If the 1939 Act is invalid, as held by the Federal Courts, bonds may still be refunded under the 1927 Law. Obviously, no bondholder will have any refunded bonds issued, no city will issue them, and no invester will purchase them until the questions are resolved.

Under *Hann* V. *City of Clinton, supra,* and the numerous cases in the lower Federal Courts following *Hann* V. *City of Clinton,* the special assessment liens are still existent. In reliance on this case, numerous declaratory judgments have been procured in all of the lower Federal Courts, holding that the liens still exist notwithstanding the attempt of the 1939 Act to absolve the property of the liens. If these liens exist, it becomes the duty of the county treasurer to sell the properties, but *Baccus* V. *Banks* has relieved the county treasurer of this responsibility. Are the Federal Court judgments binding and are the liens still existent, and is it the duty of the county treasurer to sell the property in reliance on the declaratory judgments rendered in the Federal Courts in the particular paving districts involved? These questions cannot be answered until resolved by the United States Supreme Court.

In reliance on *Hann* V. *City of Clinton, supra,* petitions have been filed for the composition of indebtedness of unincorporated special assessment districts, under Title 11, U.S.C.A., Sections 401, *et seq.* Final decrees of con-

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firmation have been entered decreeing that the liens are valid and subsisting. Are these decrees binding? This question cannot be answered until resolved by the Supreme Court of the United States.

We believe that we have clearly distinguished this case from the authorities relied on by appellees. The cases on which we rely have been heretofore cited and are definitely controlling of this question.

CONCLUSION

For the foregoing and other reasons, we respectfully pray that said motion to dismiss or affirm be denied, and that judgment be rendered reversing the judgment of the Supreme Court of the State of Oklahoma.

Respectfully submitted,

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FEBRUARY, 1948.

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APPENDIX

TITLE OF ACT:

"An Act fixing limitations upon the time in which the lien of 'street improvement bonds' issued under authority of Chapter 10, Article 12, Oklahoma revised laws of 1910 and of 'street improvement bonds' or of 'refunding street improvement bonds' issued under authority contained in Chapter 33, Article 14, Oklahoma statutes of 1931, and statutes supplementary and amendatory thereto, may be enforced by court action or otherwise; providing a method for refunding said bonds and making it the mandatory duty of the governing boards of cities and towns and of the clerks and treasurers of cities and towns to do certain things in connection therewith; providing for the designation, terms, place of payment, rate of interest, execution, and other details of the refunding bonds and that said bonds or the coupons attached may be used as cash in the payment of special assessment obligations against which said refunding bonds are issued; providing for reassessment of property liable for the bonds after notice has been given and protest period has elapsed and fixing the rate of interest on said reassessments; providing for the collection of reassessment installments, the disposition thereof, and for penalties in event of delinquency; making the refunding bonds a lien co-equal with that of other taxes; providing for foreclosure of the lien of said bonds in certain cases; prescribing rules for construction of this Act; and declaring an emergency" Laws 1939, P. 156.

§242. LIMITATION OF ACTIONS ON "STREET IMPROVEMENT BONDS" OR "REFUNDING STREET IMPROVEMENT BONDS"—HOLDER MAY ACCEPT NEW REFUNDING BONDS:

"From and after the effective date of this Act, the right of any holder to enforce the lien of any 'Street Improvement Bond' issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, or of any 'Street Improvement Bond' or 'Refunding Street Improvement Bond' issued under any authority

contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, by foreclosure, mandamus, refunding, or otherwise, shall be barred upon the expiration of three years immediately following the maturity date named in the face of such bond, unless the holder of any such bond shall have commenced suit to foreclose his lien by filing an action for that purpose and procuring service of summons therein or shall have evidenced his willingness to accept Street Improvement Refunding Bonds issued under the provisions of this Act, in exchange therefor, prior to the expiration of said three year period of limitation; Provided, however, that in all cases where the period of limitation herein mentioned has expired or will expire prior to November 1, 1939, the holder of such bonds shall have until December 1, 1940, in which to pursue his remedy or obtain the benefits of this Act. The running of the period of limitation herein fixed shall be an absolute bar to any action or proceeding brought thereafter, whether the same is plead as a defense or not, and the property against which such bonds theretofore represented a lien shall thereafter be, by operation of law, absolved of any lien or liability on account of said bonds.

"It shall the mandatory duty of the city clerk to notify the holders of all outstanding Street Improvement Bonds that the same are about to be barred by the Statute of Limitations, by mailing to the holder of each such bond at his last known address, as shown by the records of said city clerk, and by publication of notice in some newspaper of general circulation in the city or town in which such Street Improvement District is located, and if there be no newspaper published in said city or town, then the publication shall be made in some newspaper published in said county, and by publication thereof in at least one nationally recognized financial journal, which notices shall be mailed and published at least sixty days prior to the expiration of such Statute of Limitation; said notices shall be substantially in the following form:

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" 'NOTICE

" 'To all holders of Street Improvement Bonds of District No. ..... (or, if appropriate, insert the ordinance or serial No.) of the City of ....., Oklahoma:

" 'You are hereby notified that on the .....day of....., 19....., the above bonds and rights thereunder will be barred by Statute of Limitation, as provided in Senate Bill 164, Oklahoma Session Laws, 1939. You will govern yourselves accordingly.

.....

City Clerk of City of ....., Okla.'

"Failure of the city clerk to give the notice provided herein shall not impair any of the provisions of this Act. Laws 1939, P. 156, §1."

§242a. HOLDER OF BONDS MAY FILE AGREEMENT TO ACCEPT STREET IMPROVEMENT REFUNDING BONDS:

"The holder of any 'Street Improvement Bond' issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, or of any 'Street Improvement Bond' of 'Refunding Street Improvement Bond' issued under any authority contained in Chapter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, may at any time after the maturity date stated on the face of such bonds and before the running of the period of limitation mentioned in Section 1 hereof, file with the city or town clerk of the city or town in which lies the paving district against which his bond is issued, an 'Agreement to Accept Street Improvement Refunding Bonds.' Said instrument shall contain a description of the bond with reference to which it is made, showing at least the amount, the date of issue, date of maturity, amount of delinquent interest, the paving district against which it is a lien and shall recite that the person signing said instrument is the owner or holder of the bond described and is vested with legal authority to execute an agreement to accept, and does thereby agree to accept, Street Improvement Refunding

Bonds issued under authority of this Act. Said 'agreement' shall also contain a statement that the owner of the bond or bonds described therein agrees to advance his proportionate share of the cost of such refunding procedure. It shall also contain a request that the governing board of the city or town be notified of the filing of said instrument and that said governing board proceed to refund the bond or bonds described therein in accordance with the provisions of this Act. Said instrument shall not be eligible for filing with the city or town clerk as herein provided unless the maker thereof shall append thereto, his affidavit that all of the statements made therein are true and correct. It shall be the mandatory duty of the city or town clerk to accept said instrument when the same is tendered to him and to file the same in a safe and appropriate place in his office. It shall also be the duty of said clerk to convey the fact of said filing, and the information contained therein, to the governing board of said city or town at its next regular or special meeting. The filing of said instrument shall constitute 'Evidence of Willingness to Accept Street Improvement Refunding Bonds' such as will stop the running of the period of limitation mentioned in Section 1 hereof but said filing shall also limit the owner of the bond or bonds described in the instrument filed to any remedy other than that made available by this Act, whether the remedy be sought before or after said period of limitation has expired. Laws 1939, P. 157, §2."

§242b. GOVERNING BODY TO REFUND CERTAIN STREET IMPROVEMENT BONDS AND STREET IMPROVEMENT REFUNDING BONDS:

"It shall be the mandatory duty of the governing board of any city or incorporated town, whether governed by special charter or otherwise, to proceed to refund any and all 'Street Improvement Bonds' issued under authority of Chapter 10, Article 12, Oklahoma Revised Laws of 1910, and any and all Street Improvement Bonds or 'Refunding Street Improvement Bonds' issued under any authority contained in Chap-

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ter 33, Article 14, Oklahoma Statutes of 1931, and statutes supplementary and amendatory thereto, and the interest due thereon, with respect to whch the owners or holders thereof have filed an 'Agreement to Accept Street Improvement Refunding Bonds' as provided in Section 2 of this Act. Said refunding procedure shall not, however, be commenced until the bond or bonds sought to be refunded shall have been matured and past due for at least three years, but shall be commenced within six months after the expiration of said three year period. Said refunding procedure, after commencement, shall be promptly carried out in accordance with the provisions of this Act. In the event that a party or parties own all the outstanding bonds in a Street Improvement District, and have filed an 'Agreement to Accept Street Improvement Refunding Bonds,' as provided in this Act, such party or parties may file an application with the Governing Board of such city or town, for Street Improvement Refunding Bonds, as provided in this Act, prior to the expiration of the three year period, and in such event said proceedings for refund shall be commenced within six months after the filing of such application. Laws 1939, P. 158, §3."

§242c. DUTIES OF GOVERNING BOARD AND CLERK:

"During the time provided in Section 3 hereof for the commencement of refunding proceedings, the governing board of any city or town shall require from the clerk thereof a written statement showing the total amount of the bonds of any street improvement district with respect to which the owners or holders thereof have filed 'Agreement to Accept Street Improvement Refunding Bonds.' Said statement shall also contain a description of each piece of property in the special assessment district, against which assessments remain due and unpaid and said statement shall show the amount of each unpaid assessment outstanding against each piece of property and the year in which the same came due, together with the amount of interest and penalty due thereon. Said governing board shall examine said statements and if the same are found

to be true and correct, it shall enact a resolution declaring the amount of indebtedness due by reason of the total outstanding and unpaid bonds and interest against said special assessment district and that the total amount thereof shall be declared to be the basis of a reassessment against the property liable therefor to pay Street Improvement Refunding Bonds about to be issued under authority of this Act. Said resolution shall recite by number and date of passage the ordinance theretofore enacted levying assessments to pay the bonds about to be refunded, shall describe said obligations about to be refunded and declare the determination of such governing body to cause said bonds to be refunded and to levy reassessments in the amount necessary to pay said bonds and the interest accrued thereon, against the several lots, pieces and parcels of land liable for the cost of the improvement. Said resolution shall likewise recite that a full and complete statement, duly approved, showing the amount of outstanding bonds and interest thereon, together with the delinquent assessments and penalties and likewise showing the property liable for assessment to pay the same and the extent to which each such piece of property is so liable is on file in the office of the city or town clerk. The assessment levied under authority of this Act against any lot or piece or parcel of land shall not exceed the proportionate part of the Street Improvement Refunding Bonds for which that lot or piece or parcel of land is liable before the passage of this Act. Said resolution shall also recite that any person, firm or corporation interested or liable shall have the right to file a written protest against the amount shown by the statement in the office of the city or town clerk to be due against any piece of property in which such protestant is interested; provided said protest be filed within fifteen days from the date of the first publication of said resolution, and that failure to file said protest within the time stated shall be deemed to be a waiver of any right such person, firm or corporation may have had or claimed that might have been made the basis of a protest. Said resolution shall be published in a newspaper printed in the county

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and having a general circulation in the city or town and must be published in two successive issues of a weekly newspaper or in two successive Thursday issues of a daily newspaper. Laws 1939, P. 159, §4."

§242d. NOTICE TO BONDHOLDERS AND THOSE PROTESTING:

"After the time for filing protest has passed, the governing board shall cause the city or town clerk to mail a written notice to all persons, firms or corporations who have filed written protests, and to all bondholders of bonds against the special assessment district who have filed 'Agreements to Accept Street Improvement Refunding Bonds' advising as to the date, time and place, when and where the governing board of said city or town will hear protestants' objections orally. If at said hearing it is established that the statements of the amount of bonds outstanding, the property liable for assessments against the same are in error, the governing board shall correct the same accordingly. Laws 1939, P. 160, §5."

§242e. HEARING—ORDINANCE:

"After the governing board of any city or town has heard all protests and the amount of assessments and penalties due from each piece of property in the special assessment district has been definitely determined and confirmed said board shall scale down the total special assessment obligation for which each lot, piece or parcel of real estate was liable before refunding so as to determine the amount for which each such piece of property should be reassessed in order to raise its proportionate part of the revenue necessary to retire an amount of 'Street Improvement Refunding Bonds' equal to the total amount represented by the 'Agreements to Accept Street Improvement Refunding Bonds' that have been filed, plus accrued interest, said governing board shall then enact an ordinance describing each piece of property in the special assessment district liable for special assessments and state the total amount of assessments and penalties for which each piece so described is liable as reapportioned and said ordinance

shall also declare that the amounts set opposite each such description are thereby reassessed against said properties and that said ordinance shall constitute the levying authority whereby said amounts named shall be payable in ten equal annual installments and shall bear interest at the rate of seven (7%) per cent per annum until paid. Said ordinance shall also recite that unless said amounts are paid within thirty (30) days from the date of publication of said ordinance, said levies shall thereafter be payable only in accordance with the provisions of this Act and that the owners of the property so named shall have the privilege of paying all of the amounts set opposite the description of their property, without interest, within thirty (30) days from the date of the publication of said ordinance and thereby relieve said property of any lien or obligation arising out of the improvements constituting the basis of said assessments. Said ordinance shall be published once in some newspaper printed in the County and having a general circulation in said city or town. Such special assessments and each installment thereof and the interest thereon are hereby declared to be a lien against the lots or tracts so assessed from the date of the publication of said ordinance and said lien shall be co-equal with the lien of other taxes and shall be prior and superior to all other liens against such lots or tracts and such liens shall continue as to unpaid installments and interest until such assessments and interest thereon shall be fully paid, but unmatured installments shall not be deemed to be within the terms of any general covenant of warranty. Laws 1939, P. 160, §6."

§242f. "ASSESSMENT RECORD OF STREET IMPROVEMENT REFUNDING BONDS" BOOK, ENTRIES IN:

"As soon as the assessing ordinance is adopted, the city or town clerk shall prepare a book which shall be known as the 'Assessment Record of Street Improvement Refunding Bonds' in which he shall enter a description of each lot, tract or subdivision or real estate to be assessed in accordance with the provisions of said ordinance, setting out the amount of each assessment

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and leaving a space for entering the name of the owner of each such lot, tract or subdivision and a blank space for entering the payments which may be made from time to time on account of such assessment. Laws 1939, P. 161, §7."

§242g. FIRST INSTALLMENT OF ASSESSMENTS DUE WHEN—PAYMENT OF ASSESSMENTS AND INTEREST:

"The first installment of said assessments, together with interest upon the whole thereof from the date of the passage of the assessing ordinance to the first of the next following September, shall be due and payable on or before the first day of September next succeeding the passage of the ordinance; provided, however, if such assessing ordinance is not passed prior to the first day of August in any year, the first installment of such assessment shall be due and payable with interest from the date of the passage of such assessing ordinance to the first day of September of the following year. In case any installment or interest is not paid when due, the installment so matured and unpaid and the unpaid interest thereon shall draw interest at the rate of twelve per cent (12%) per annum from maturity until paid, except as hereinafter otherwise provided. All assessments and interest shall be paid to the city or town clerk, who shall deliver same to the city or town treasurer who shall keep the same in a separate special fund for the purpose of paying the bonds and interest coupons thereon issued against such assessments, and after the payment of all bonds that have been issued against the special assessment district, and the interest thereon, and any surplus remaining in said fund shall be paid into the general revenues of said city or town. Laws 1939, P. 161, §8."

§242h. ISSUANCE OF NEGOTIABLE COUPON BONDS —RESOLUTION—RECITALS OF BONDS—REGISTRATION:

"Immediately after the expiration of thirty (30) days from the publication of the assessing ordinance, within which period the whole of any assessment may be paid without interest, the governing body of such city or town shall provide by resolution for the issu-

ance of negotiable coupon bonds in the aggregate amount of such assessments then remaining unpaid, bearing date of thirty (30) days after the publication of the ordinance levying the assessments and in denominations of one-hundred ($100.00) dollars or as said governing body finds to be convenient in effectuating an exchange with the holders of the bonds being refunded, which bonds shall in no event be or become a liability of the city or town issuing the same. The bonds herein provided for shall recite that they are negotiable under the laws of Oklahoma and that they are payable at the expiration of eleven (11) years from their date, subject to partial pro rata payments on the principal with proportionate reduction of interest coupons in accordance with any such payments; and that in addition to other recitals each coupon shall provide that it is subject to reduction in accordance with any payments made on the principal of the bond to which it is attached.

"Said bonds shall be made to bear interest at the rate of six (6%) per cent per annum from their date until paid, payable on the first day of September of each year, beginning on the second September following the date of said bonds. Said bonds shall be designated 'Street Improvement Refunding Bonds' and shall recite that they are issued in pursuance of this Act for the purpose of refunding outstanding bonds against the special assessment district described therein by naming the street or streets, or parts thereof, or other public place, with respect to which the original bonds were issued, and that they are payable from the reassessments which have been levied upon the lots, tracts or subdivisions of land benefitted by said improvement and from the accumulation of the interest and penalty provided by law; said bonds shall further recite the number of the ordinance and date of its passage by which reassessments therefor have been levied; said bonds shall further recite that they may be used in the payment of any special assessment installment against which they are issued or the interest or penalties accumulated thereon and that the matured interest coupons attached thereto may be used likewise, but that

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in no event shall said bonds or coupons be credited against any such special assessment installment or the interest or penalty accumulated thereon, except at par value; each of said bonds shall further recite that it is a part of an issue aggregating (state the amount) the total special improvement obligation of the district against which it is issued and that no bond of said issue shall enjoy priority of payment over any other bond of said issue, notwithstanding the numerical designation of any bond. Said bonds shall be signed by the mayor of said city or the president of the board of trustees of such town and shall be attested by the city or town clerk, and shall have the impression of the corporate seal of the city or town thereon, and shall have interest coupons attached thereto, maturing in accordance with the tenor of said bonds, bearing facsimile signatures of the mayor and city clerk or president of the board of trustees and town clerk, as the case may be; said bonds and interest coupons shall recite that they are payable at the office of the city or town treasurer. Said bonds shall be numbered consecutively beginning with number one(1), but said numerical designation shall not constitute any priority as to payment of any bond over the other. Each such bond shall be registered by the clerk and treasurer of such city or town in books to be provided for that purpose and each such bond shall bear an endorsement executed by the clerk and treasurer of such city or town certifying that said bonds have been so registered. Neither said bonds nor coupons shall be so issued as to be subject to call or redemption in cash before the date of maturity stated thereon. Laws 1939, P. 162, §9."

§242i. USE OF REFUNDING BONDS TO PAY INSTALLMENT OF SPECIAL ASSESSMENTS OR INTEREST:

"Any of said Street Improvement Refunding Bonds and matured coupons may be used the same as cash in the payment of any or all matured or unmatured installments of special assessments or any part of any such installment, levied against any property within the special assessment district for which said bonds

and coupons are issued, or in payment of any interest or penalty that has accrued upon any such installments, and when so used it shall be the duty of the city or town clerk accepting such payment to credit the lot, tract or parcel of land for which such payment is made, with credit equal to the face amount of bonds and matured coupons tendered to him, charging off the oldest special assessment obligations and interest accrued, provided however, it shall be unlawful for any city or town clerk or treasurer in accepting any such bond or matured coupon, to credit only a part thereof on any assessment obligation and return any cash, voucher or warrant to the person, firm or corporation tendering the same, and provided further that no such bond shall be accepted as cash in payment of a special assessment obligation unless all of the unmatured coupons are attached thereto. Any bond or matured coupon so tendered must be entirely credited against some outstanding assessment obligation or otherwise they may not be used at all for that purpose, but no credit shall be given for the unmatured coupon attached to any such bonds. Whenever any such Street Improvement Refunding Bond or Coupon shall have been paid by the city or town treasurer, or shall have been received in connection with the payment of any outstanding special assessment obligation as provided for in this Section, whether matured or not, it shall be the duty of the city or town treasurer receiving the same to mark each such bond or coupon 'Paid' in red ink or with a punch bearing said word, and thereafter to keep the same in a place of safekeeping. Laws 1939, P. 163, §10."

§242j. CASH PAYMENT—DELIVERY OF REFUNDING BONDS TO HOLDERS PAR FOR PAR WHEN—ADJUSTMENT IF DIFFERENCES—CANCELLATION OF ORIGINAL BONDS:

"All cash payments made within said period of thirty (30) days following the date of the publication of the ordinance levying such assessments, shall be paid to the city or town treasurer who shall place the same in a separate special fund. Such Street Improvement Refunding Bonds in such amount as shall represent the

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unpaid assessments as provided for in this Act, shall be delivered to the holder or holders of such original bond or bonds and accrued interest and coupons in exchange for such original bond or bonds and accrued interest and coupons at a rate of par for par and if, due to payments made during the thirty (30) days period herein mentioned, there are fewer Special Assessment Refunding Bonds issued than are necessary to effectuate a par for par exchange, the difference shall be adjusted out of the cash receipts placed in said special fund during said thirty (30) day period. In event any such cash adjustments are necessary, each holder of the obligations being refunded shall participate proratably in the available cash. All the original bonds and coupons so received in said exchange shall be cancelled and a record of such cancellation so made upon the bond register of such city or town. Laws 1939, P. 164, §11."

§242k. ASSESSMENTS PAYABLE WHEN — ACCOUNT OF COLLECTIONS—USE OF FUND—PRE-PAYMENT OF BONDS:

"The assessments provided for and levied under the provisions of this Act shall be payable as the several installments become due, together with interest thereon, to the clerk of such city or town, who shall give proper receipt for such payments, and credit the same upon the 'Assessment Record of Street Improvement Refunding Bonds.' It shall be the duty of the city or town clerk to keep an accurante account of all such collections made by him, and to pay to the city or town treasurer daily the amounts of such assessments collected by him in cash, and the amounts so collected and paid to the city or town treasurer shall constitute a separate, special fund to be used and applied to the payment of such bonds and the interest thereon as follows: such fund shall first be used to the payment of the matured interest coupons due on such bonds and after the payment thereof the balance in such special fund to be applied on the principal of the outstanding bonds; provided that no pre-payment on the principal of such bonds shall be made unless there is

on hand in such fund after the payment of matured interest coupons, a sum equal to or greater than ten per cent of the principal of said outstanding bonds; and provided further that the remaining interest coupons on said bonds, shall be reduced in proportion to the amount of such payments. Such bonds and coupons as are received by the city or town clerk in payment of such special assessment obligations shall be delivered daily to the treasurer of said city or town, the same as cash and upon receipt of said bonds or coupons by said treasurer, and at the time the same are by said treasurer marked 'Paid' as in this Act provided, said treasurer shall cause his bond register to recite the date and manner by which said bonds or coupons were retired. Laws 1939, P. 164, §12."

§2421. DELINQUENT INSTALLMENTS OF REASSESSMENTS—ACTION TO FORECLOSE LIEN:

"In any installment of reassessment levied under the provisions of this Act providing for the payment of said Street Improvement Refunding Bonds shall have been delinquent for a period of at least twelve (12) months, the holder of any bond issued under the provisions of this Act, retirement of which cannot be had by reason of insufficient money being on hand in the special fund provided for the retirement thereof, shall have the right to institute, in the name of the city or town, issuing such bond, an action in the District Court of the County in which said property is located to foreclose the lien of such assessment, stating in said petition generally the ownership of such bond or coupon, the facts concerning the delinquency in payment of the same, describing the property assessed, the nature of the improvement, the amount of the unpaid delinquent reassessment and interest and penalty due thereon and praying for the foreclosure of such lien. Upon the filing of such suit all unmatured installments of assessments shall become due and payable and the lien of such assessments foreclosed in such action. Summons shall be issued on such petition as in other civil actions and the cause tried by said District Court. Judgment may be entered thereon for the amount of all reassess-

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ments levied, both matured and unmatured, together with interest and penalty due on such installments as have become delinquent and said judgment shall bear interest at the rate of six (6%) per cent per annum from the time of the institution of such action until said judgment is paid. In event said judgment, together with interest and cost, is not paid within thirty (30) days after the date of rendition thereof, an order of sale shall issue by the clerk of said court, directed to the sheriff of the county, to sell said real estate in the manner and form provided for the sale of real estate without appraisement. Such judgment shall carry the cost of such action together with the cost of such sale; and upon the payment of such judgment, the amount received shall be paid to the clerk of said court who shall pay over all of the money received except that part representing the costs of said case to the city or town treasurer who shall then credit the same to the separate special fund provided for the payment of such outstanding Street Improvement Refunding Bonds and interest thereon. Such judgment shall not be paid except in lawful money of the United States of America, but nothing herein shall be construed to prevent the dismissal of such foreclosure action at any time prior to judgment upon payment of the total delinquent reassessments, interest and penalty for which the property sought to be foreclosed is liable, in bonds or coupons as provided in this Act, and the payment of the costs accrued in said action to the date of such dismissal. The judgment mentioned herein shall provide for the sale of said real estate subject to existing general and *ad valorem* taxes and subject to any special assessments not foreclosed in said action. All owners or encumbrancers shall be made parties defendant in such suit. Laws 1939, P. 165, §13."

§242m. SUITS TO SET ASIDE ASSESSMENT OR FOR INJUNCTION—CORRECTIVE ASSESSMENT:

"No suit shall be sustained to set aside any assessment or to enjoin the governing body of any city or town from levying or collecting any such assessment, or installment thereof or interest or penalty thereon,

or issuing the bonds or providing for their payment or contesting the validity thereof on any ground, or for any reason, other than for the failure of such governing body to adopt and publish the resolutions and ordinances provided for in this Act, unless such suit shall be commenced within fifteen (15) days after the publication of the ordinance levying reassessments; and provided, however, that in the event any special reassessment shall be found to be invalid or insufficient in whole or in part, for any reason whatever, the governing body may at any time in the manner provided for in this Act, proceed to cause a new and corrective assessment to be made and levied which shall have the same force and effect as if the same had been properly made in the beginning. Laws 1939, P. 166, §14."

§242n. VOID ASSESSMENTS OR OBLIGATIONS NOT AFFECTED BY ACT:

"This Act shall not be construed to validate any void assessment heretofore made or any improvement bonds heretofore issued; nor shall any proceedings hereunder operate to make binding upon any property owner any previous invalid obligation but every defense available against the original assessment shall be preserved to and be available against any issue of refunding bonds issued hereunder. Laws 1939, P. 166. §15."

§242o. CONSTRUCTION IN ENTIRETY—ENTIRE ACT VOID IF PART IS VOID:

"It is hereby declared to be the intention of the Legislature, in the enactment of this Act, that it be construed in its entirety; and that, if any part thereof is unconstitutional and void, the entire Act shall be void. Laws 1939, P. 166, §16."

(The foregoing is found in the 1939 Session Laws as Chapter 33, Article 5, Sections 1 to 16, inclusive, and is described in Oklahoma Statutes Annotated as Sections 242 to 242o, inclusive, Title 11.)